No. 88-491

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITIZENS FOR JOHN W. MOORE PARTY, JOHN W. MOORE, and WILLIE ANDERSON,

Petitioners,

v.

BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS STATE BOARD OF ELECTIONS

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QUESTIONS PRESENTED

1. Whether this case is moot, where the 1982 election has been concluded; where petitioner Moore subsequently abandoned his independent political party and ran in a 1984 primary election as a candidate for the Democratic party; and where, in the last three general elections, no similar factual scenario involving either petitioner Moore or any other candidate has ever recurred.

2. Whether section 10-4 of the Illinois Election Code violates a candidate's right to free speech when it prohibits him from circulating his own election petitions as a candidate of a new political party because he has, in the same election season, already circulated his own petitions to run in the primary election of a different political party.

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BRIEF IN OPPOSITION OF RESPONDENT ILLINOIS STATE BOARD OF ELECTIONS

The respondent Illinois State Board of Elections respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion of April 18, 1988. That opinion is reported at 845 F.2d 144 (1988).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE PETITION SHOULD BE DENIED BECAUSE THE CONTROVERSY IS MOOT.

In the instant case petitioners challenge the constitutionality of a portion of section 10-4 of the Illinois Election Code. Ill. Rev. Stat. ch. 46, ¶ 10-4 (1987). That statute provides in pertinent part:

> [N]o person shall circulate or certify petitions for candidates of more than one political party, or for an independent candidate or candidates in addition to one political party, to be voted upon at the next primary or general election. . . .

As the Court of Appeals explained, this law operates to prevent anyone from collecting signatures on behalf of different political parties during the same election season. *Citizens for John W. Moore Party v. Board of Election Commissioners* (*Moore III*), 845 F.2d 144, 145 (7th Cir. 1988).

Because Moore had been a circulator for the Democratic party in the primary, he could not be a circulator for a different party during the same election period. *Id.* at 146. Since Moore violated this law by collecting signatures for his candidacy in the 1982 general election as a member of the Citizens for John W. Moore Party, those signatures were deemed invalid, and, as a consequence, he failed to submit the requisite number of valid signatures to place his name on the ballot.

Initially, petitioners sought an injunction to have Moore's name placed on the 1982 ballot. That injunction was de-

nied by the district court, but this litigation has been pending since that time, through three more Illinois general election seasons, with respect to the constitutional issues raised by petitioners. In response to petitioners' request that this Court now proceed to entertain this matter or to remand it for yet another opinion from the Seventh Circuit, respondent respectfully suggests that this matter is moot and that no further proceedings are warranted.

The jurisdiction of the federal courts is limited by Article III of the Constitution to the adjudication of actual ongoing controversies between litigants. *Deakins v. Monaghan*, ____ U.S. ____, 108 S. Ct. 523, 528 (1988). "The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1987). Accordingly, a case is moot if "there is no subject matter on which the Court's order can operate." *Ex parte Baez*, 177 U.S. 378, 390 (1900).

A dispute may avoid dismissal on mootness grounds if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). In *Weinstein v. Bradford*, 423 U.S. 147 (1975), this Court applied a two-part test for determining if this exception should apply. It explained that a case is not moot where: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there [is] a reasonable expectation that the *same complaining party would be subjected to the same action again*. 423 U.S. at 149 (emphasis added). *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979). Given the brief nature of any single election season, the instant suit does satisfy the first element of the test.

There is, however, no reasonable expectation that the same complaining parties will be subjected to the same action again. In order for this to occur, Moore would again have to circulate petitions to be a candidate for a primary election; he would have to withdraw before the primary; then he would have to wish to run in the general election under a different party and solicit signatures in support of his candidacy in the general election. If all this were to take place, the Chicago Board of Election Commissioners, sitting as the appropriate electoral board, would exclude only the signatures gathered in violation of the law. If the remaining valid signatures were too few to meet the statutory requirement, then Moore's name would not be placed on the ballot. Only if there exists today a "reasonable expectation" that all these events will recur can it be concluded that this case is not moot.

As demonstrated by the statement of the State Board of Elections appended to this brief, not only has this scenario—involving either John W. Moore or any other would-be candidate—failed to recur in the last three general election seasons, but Moore did in fact stand as a candidate in a 1984 Democratic primary election. There is no record that he sought, during the 1984 election season, to undertake any activity on behalf of the Citizens for John W. Moore Party, or that he pursued any State political aspirations in the two election years that followed his 1984 defeat. Based upon this subsequent action (or inaction) of Moore, it must be concluded that this case is moot.

Such a conclusion is bolstered by other cases in which this Court has had occasion to address the mootness issue in an election litigation context. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Hall v. Beals*, 396 U.S. 45, 47 (1969); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75

(1978); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886, 1890 n.2 (1988). In *Meyer*, for example, this Court held the issue was likely to recur where the plaintiffs continued to pursue adoption of the constitutional reform and obtain signatures necessary to place the referendum on the ballot. *Meyer*, 108 S. Ct. at 1890 n.2.

Similarly, in *First National Bank of Boston*, this Court invalidated a criminal statute prohibiting corporate expenditures regarding individual income tax referenda and held that the issue was not moot, notwithstanding the passage of the 1976 election. 435 U.S. at 765. The case fit within the "capable of repetition, yet evading review" exception because the 1976 election marked the fourth time that the subject referendum was put before the Massachusetts voters and plaintiffs insisted that they would continue to oppose the referendum in the future. 435 U.S. at 775.

In both *Meyer* and *First National Bank of Boston*, the plaintiffs established a strong factual basis for this Court to conclude that there existed a "reasonable likelihood" that those plaintiffs would be subject to the same action again. By contrast, the absence of the Citizens for John W. Moore Party from the political process for six years demonstrates a lack of factual support for any conclusion that there exists a "reasonable likelihood" that the dispute which arose in 1982 will recur. This Court should recognize, therefore, that this matter is moot.

II.

THE SEVENTH CIRCUIT CORRECTLY ANALYZED SECTION 10-4 AS "SIMPLY A LESS RESTRICTIVE ALTERNATIVE TO A PERMISSIBLE SORE LOSER STATUTE" RATHER THAN AS AN ATTEMPT BY THE STATE TO IMPOSE AN UNCONSTITUTIONAL LIMITATION ON A CIRCULATOR'S FREEDOM OF SPEECH.

Relying heavily on this Court's recent decision in *Meyer v. Grant*, ____ U.S. ____, 108 S. Ct. 1886 (1988), petitioners argue that section 10-4 of the Election Code places an unconstitutional limitation on core political speech, by prohibiting Moore from circulating his own petitions to run in a general election as a candidate of a new political party. Petitioners have failed, however, to recognize critical differences between *Meyer* and their own case, differences which require a conclusion that the holding in *Meyer* does not extend to the circumstances presented here.

As already explained, section 10-4 provides that a person may not circulate candidate petitions for more than one political party (or for a party member as well as an independent candidate) during the same election season. Ill. Rev. Stat. ch. 46, ¶ 10-4 (1987). Application of the statute to the circumstances of this case required the invalidation of signatures obtained by Moore as a candidate of the Citizens for John W. Moore Party in the 1982 general election, as Moore had previously circulated petitions for his candidacy in the 1982 Democratic primary election. Because of the operation of this provision, Moore's attempted general election candidacy fell 139 signatures short of the total required for a place on the ballot.

The statute did not, however, preclude Moore from speaking with or in any other way soliciting the support of potential voters. Indeed, section 10-4 in no way prohibited

Moore from accompanying a qualified circulator, explaining the nature of his candidacy (and, if he chose, the reason why he could not circulate his own petitions), disclosing his political agenda, or requesting the support of his constituency.

It is important to recognize that the statute contains no blanket prohibition of a candidate's efforts on his own behalf; it only affects his activity as a circulator if he has already, during the same election year, acted as a circulator on behalf of a different party or independent candidate. Essentially, the statute allows a would-be candidate who also wants to circulate his own petitions only one opportunity per election season to align himself with a chosen political party or to seek support as an independent candidate.

As the Seventh Circuit noted, this Court has held that there is no fundamental right to be a candidate. *Clements v. Fashing*, 457 U.S. 957, 963 (1982). Thus, a State may constitutionally impose candidacy restrictions that would absolutely preclude a person in Moore's position from seeking a place on the 1982 general election ballot. *Storer v. Brown*, 415 U.S. 724 (1974). The lesser restriction imposed by section 10-4, which operates only because of Moore's prior decisions to run as a Democrat in the 1982 primary election and to circulate his own petitions at that time, is not unconstitutional as a matter of logic or as a matter of precedent.

This Court's decision in *Meyer* does not obviate the above conclusion. At issue in *Meyer* was a State law making it a felony to pay circulators of "initiative petitions" to have proposed new laws or constitutional amendments placed on the ballot at a general election. This Court ruled the criminal penalty statute unconstitutional, focusing on the proponents' protected right to convey their message

regarding a desired governmental change. The proposed circulation of petitions by paid circulators was a means to a protected end and thus was entitled to protection from unwarranted interference by the State.

In the case at bar, however, the restrictions imposed upon Moore impacted only on his ability to circulate his petitions as a candidate for a new political party after he had already stood for a Democratic primary election, and circulated his own petitions in connection with that candidacy, during the same election season. The message that Moore subsequently sought to convey—"I want to be your candidate in the general election"—is one which the State might legitimately suppress in its entirety, based upon Moore's primary election candidacy. *Storer v. Brown*, 415 U.S. 724 (1974).

Illinois neither outlawed Moore's second attempted candidacy, nor did it absolutely prevent him from circulating petitions on his own behalf. The State simply required him to limit his circulating efforts to one political party of his choice per election season. Moore made his choice during the primary election, and the State is not prevented by the Constitution from requiring Moore to live with the consequences of that choice. *See Moore III*, 845 F.2d at 146, where the Seventh Circuit acknowledged this Court's observation that "the government may attach rationally-justified consequences to voluntary conduct. . . ," *citing Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976). Thus, it cannot be said that State action deprived Moore of his right to freedom of speech. Rather, his ability to seek candidacy is what is ultimately at issue here, and the State's regulation of that activity is less severe than that which is allowable under the Constitution. Moore was free under Illinois law to circulate petitions for his candidacy and thereby convey whatever message he wished by virtue

of this activity, so long as he did not attempt to circulate petitions for different parties during the same election season. Neither the holding nor the reasoning of this Court in *Meyer* is applicable to the circumstances presented here, and that decision does not warrant issuance of a writ of certiorari in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

[*Letterhead Of*]

STATE BOARD OF ELECTIONS
STATE OF ILLINOIS

December 8, 1988

The Honorable Neil F. Hartigan
Attorney General of Illinois
SOIC - 12th Floor
100 W. Randolph St.
Chicago, IL 60601

ATTENTION: Rosalyn Kaplan, Civil Appeals

RE: Citizens for John W. Moore Party

Dear Mr. Attorney General:

At the request of your Division of Civil Appeals, I have searched the records of the Illinois State Board of Elections to determine if, since 1982 John W. Moore or any group of citizens acting on his behalf as petitioners, have submitted petitions for Moore for any state-wide offices in any partisan primary; withdrawn those petitions prior to the primary itself; and subsequently filed new party nominating petitions for any office to be voted on at the same election at which the winner of the primary would also be a candidate. I have examined the records of the general elections of 1984, 1986 and 1988.

My review disclosed only that John W. Moore submitted nominating petitions for the primary election of 1984 as a candidate for the Democratic nomination for State Senator from the 12th legislative district of Illinois. Mr. Moore did not withdraw those petitions; rather, he was a participant in that primary election and lost the

nomination to Charles Chew, who subsequently won the seat in the general election.

My inquiry further discloses that neither John W. Moore or any group of citizens acting in his behalf, nor any other candidate or group of citizens acting in his or her behalf, has since 1982 first filed nominating petitions in a partisan primary for state office, next withdrawn those petitions, and finally filed new party nominating petitions for any office to be voted on at the same election at which the winner of the primary would also be on the ballot.

Yours, truly,

/s/ A. L. ZIMMER
A. L. ZIMMER
General Counsel

ALZ/dlg